

32
No. 198

In the Superior Court of Pennsylvania
Philadelphia District

No. 335 October Term, 1941

CITY OF PHILADELPHIA,

Appellee.

v.

NORMAN C. SCHALLER,

Appellant

BRIEF FOR APPELLER

*Appeal from the judgment of the Municipal Court
of the County of Philadelphia, as of May Term,
1941, No. 55.*

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I.

COUNTER-STATEMENT OF QUESTIONS
INVOLVED

1. Are Federal employees, residing in Philadelphia, subject to a general income tax, regardless of where they perform their duties?

2. Does the Sterling Act of August 5, 1932, P. L. 45, (53 PS 4613) permit the city to impose a tax upon the income of non-residents earning such income in the city of Philadelphia; and residents of Philadelphia, regardless of where they earn their income?

II.

COUNTER-HISTORY OF THE CASE

On December 13, 1939, Councils of the City of Philadelphia enacted an Ordinance imposing a tax for general revenue purposes on salaries, wages, commissions and other compensation earned after January 1, 1940 by residents of Philadelphia, and upon non-residents of Philadelphia for work done or services performed or rendered in Philadelphia, at the rate of $1\frac{1}{2}\%$ of the salaries, wages, commissions and other compensation affected thereby. The tax was first imposed as to such salaries on those that were earned during the calendar year 1940 (see Ordinances of 1939, p. 656).

Persons whose earnings were subject to the tax were required on or before March 15th of each year to make and file with the Receiver of Taxes on the form furnished by him a return showing the aggregate amount of the salaries earned during the preceding year.

During the first two weeks of March, 1941, a number of Federal employees residing in the City of Philadelphia, working either at the Navy Yard or at other places, filed their returns with the Receiver of Taxes and delivered to the said Receiver of Taxes their checks either for the first quarter of the annual tax due or for the entire annual tax due.

Several days prior to the 15th of March, appellant's counsel sent a letter to the Navy Yard Association, advising that in his opinion the Federal

employees were not required to pay the City income tax. By reason of such letter, many of the Federal employees stopped payment on their checks.

After waiting for several weeks, the City then instituted in the Municipal Court suits in assumpsit against twenty-two Federal employees, working in the Navy Yard and in other places. In each Statement of Claim it was averred that a return had been filed by the particular employee, a check given and thereafter payment stopped.

The City in each Statement of Claim sought to recover not only the tax due, in accordance with the return filed, but in addition thereto, interest at the rate of 6% on the entire amount together with an additional $\frac{1}{2}$ of 1% on the amount of unpaid tax for the first six months of non-payment and a penalty of \$100., as required by the Ordinance.

After each of the defendants were served with a summons and a copy of the Statement of Claim, nine of those sued appeared at the City Solicitor's office and paid the amount of the check together with a \$5.00 fine for stopping payment of the check and the costs of suit.

Several weeks after the said suits were instituted, Michael Francis Doyle, Esq. entered an appearance for thirteen of the twenty-two Federal employees that were sued, and a stipulation was entered into between Mr. Doyle and the City Solicitor that in the present case an Affidavit of Defense would be filed and that the judgment entered herein should control and be final and binding in the other twelve suits.

Thereafter, an Affidavit of Defense raising Questions of Law was filed in this case, claiming that

Federal employees, even though residents of the City of Philadelphia, were exempt from the City income tax because they work within a Federal reservation; and also because the City has no power to impose a tax upon the income of Federal employees.

The oral argument for the disposition of the Affidavit of Defense raising questions of law was continued on several occasions because appellant's counsel stated that the Federal government, through the Attorney General, desired to intervene and participate in the argument; and on one occasion a United States Assistant District Attorney appeared and asked for a continuance until the pleadings in the present case could be carefully studied in order to determine whether the United States Attorney General would participate in the argument.

After a long delay the United States Attorney General did not participate in the argument.

The matter was then argued by private counsel; and after such argument an opinion was filed by Judge Tumolillo overruling the questions of law raised and entering judgment in favor of the City of Philadelphia (R. p. 11a). The appeal to this court followed.

III.
ARGUMENT

1. ARE FEDERAL EMPLOYEES, RESIDING
IN PHILADELPHIA, SUBJECT TO A GENERAL
INCOME TAX, REGARDLESS OF WHERE
THEY PERFORM THEIR DUTIES

The defendant in this case, Norman Charles Schaller, filed his return with the Receiver of Taxes on March 12, 1941 showing that he worked as a marine engineer in the Philadelphia Navy Yard, earning for the year 1940 a net sum of \$2,596.73, and that he owed the sum of \$38.95 as taxes under the Ordinance of December 13, 1939, which was at the rate of one and one-half percent. of the salary earned by him; and accompanied the said return with a check made to the order of the Receiver of Taxes for \$38.95.

The Statement of Claim filed in this case avers that subsequent thereto he stopped payment on the said check and by reason thereof payment was refused and the check was returned marked "payment stopped" (R. p. 2a).

Paragraph 3 of the Statement of Claim recites the passage of the Ordinance of December 13, 1939 and paragraph 8 claims to recover this sum of \$38.95, together with interest at the rate of 6%, penalties of \$100.00 plus an additional $\frac{1}{2}$ of 1% on the amount of unpaid tax for the first six months of non-payment.

Since the defendant in this case filed an Affidavit of Defense raising Questions of Law, all the averments of the Statement of Claim must be taken as true.

A reading of the Ordinance discloses that the tax is imposed for general revenue purposes upon the salaries, wages, commissions and other compensation earned by residents of Philadelphia, without any exceptions.

Section 2 reads as follows:

“An annual tax for general revenue purposes of one and one-half percentum is hereby imposed on (a) salaries, wages, commissions and other compensation earned after January 1, 1940 by residents of Philadelphia; * * *

It will thus be noted that Federal employes are not excepted, from the general language just quoted.

Many years ago, the Federal Courts did hold that the salary of Federal Judges can not be taxed by the State or its agencies. By reason of the strong dissent of Mr. Justice Holmes in the case of *EVANS v. GORE*, 253 U. S. 245, 265; 64 L. Ed. 887, 897; 11 A. L. R. 519, and decisions in the cases of *GRAVES v. O'KEEFE*, 306 U. S. 466, 83 L. Ed. 927; 120 A. L. R. 1466; and *STATE TAX COMM. v. VanCOTT*, 306 U. S. 511, 83 L. Ed. 950, it is now definitely established that no salary of any Federal employe, including a Judge's salary, is exempt from a *general* income tax by the State or any of its *governmental agencies*.

Mr. Justice Holmes in his dissenting opinion said:

“In the first place, I think that the clause protecting the compensation of judges has no

reference to a case like this. The exemption of salaries from diminution is intended to secure the independence of the judges. * * * *That is a very good reason for preventing attempts to deal with a judge's salary as such, but seems to me no reason for exonerating him from the ordinary duties of a citizen, which he shares with all others.* To require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge. I see nothing in the purpose of this clause of the Constitution to indicate that the judges were to be a privileged class, free from bearing their share of the cost of the institutions upon which their well-being, if not their life, depends." (Italics supplied)

Mr. Justice Stone (now Chief Justice) in the case of *GRAVES v. O'KEEFE*, *supra*, stated the question involved as follows:

"We are asked to decide whether the imposition by the State of New York of an income tax on the salary of an employee of the Home Owners' Loan Corporation places an unconstitutional burden on the Federal Government."

In answering the question, he said (pp. 480, 486, 497):

"The present tax is a non-discriminatory tax on income applied to salaries at a specified rate. It is not in form or substance a tax upon the Home Owners' Loan Corporation or its property or income, nor is it paid by the corporation or the government from their funds. *It is measured by income which becomes the property of the taxpayer when received as compen-*

*sation for his services; and the tax laid upon the privilege of receiving it is paid from his private funds and not from the funds of the government, either directly or indirectly. * * **

In no case is there basis for the assumption that any such tangible or certain economic burden is imposed on the government concerned as would justify a court's declaring that the taxpayer is clothed with the implied constitutional tax immunity of the government by which he is employed. That assumption, made in *Collector v. Day*, supra, and in *New York ex rel. Rogers v. Graves*, supra, is contrary to the reasoning and to the conclusions reached in the *Gerhardt* case and in *Metcalf & Eddy v. Mitchell*, supra; *Group No. 1 Oil Corp. v. Bass*, 283 U. S. 279; *James v. Dravo Contracting Co.*, supra; *Helvering v. Mountain Producers Corp.*, supra; *McLoughlin v. Commissioner*, 303 U. S. 218. In their light the assumption can no longer be made. *Collector v. Day*, supra, and *New York ex rel. Rogers v. Graves*, supra, are overruled so far as they recognize an implied constitutional immunity from income taxation of the salaries of officers or employees of the national or a state government or their instrumentalities.

“So much of the burden of a non-discriminatory general tax upon the incomes of employees of a government, state or national, as may be passed on economically to that government, through the effect of the tax on the price level of labor or materials, is but the normal incident of the organization within the same territory of two governments, each possessing the taxing power. The burden, so far as it can be said to

exist or to affect the government in any indirect or incidental way, is one which the Constitution presupposes, and hence it cannot rightly be deemed to be within an implied restriction upon the taxing power of the national and state governments which the Constitution has expressly granted to one and has confirmed to the other. The immunity is not one to be implied from the Constitution, because if allowed it would impose to an inadmissible extent a restriction on the taxing power which the Constitution has reserved to the state governments." (Italics supplied)

In the latter case of *STATE TAX COMM. v. VAN COTT*, *supra*, Mr. Justice Black said (p. 515):

"We have now re-examined and overruled the doctrine of *Rogers v. Graves* in *Graves v. O'Keefe*, Ante, p. 466. Salaries of employees or officials of the Federal Government or its instrumentalities are no longer immune, under the Federal Constitution, from taxation by the State."

In *O'MALLEY v. WOODROW*, 307 U. S. 277, 83 L. Ed. 1289, 122 A. L. R. 1379, Mr. Justice Frankfurter reviews the law as regards the immunity of a judge's salary from taxation from its earliest days and makes this significant statement:

"To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government, whose Constitution and laws they are charged with administering."

From these decisions, it seems quite clear that Federal employees are not exempt from a *general* income tax merely because either *part* or *all* of the income of such Federal employee may be derived from compensation paid to them by the Federal Government.

The rule enunciated in the cases cited was recognized by the Supreme Court of this State as applicable to the present ordinance when it affirmed the decision of C. P. No. 7 of Philadelphia County on the opinion of Oliver, P. J. in upholding the constitutionality of the ordinance in question in the case of *DOLE v. CITY OF PHILADELPHIA*, 337 Pa. 375, 11 A. (2d) 163, wherein, in answering the attack upon the constitutionality of this ordinance because it imposes a tax upon public officers, it was said:

“The modern view is that such constitutional provisions as the one relied upon are not intended to relieve public officers, judges included, from the just and necessary burdens of taxation”.

In another case decided by President Judge Oliver, *STOUDT v. CITY OF PHILADELPHIA*, 38 D. & C. 222, 228, a group of railroad employees complained against the imposition of the tax under this ordinance upon them, on the theory that since they were paid for services rendered in interstate commerce, the ordinance in effect was a regulation or *burden* of such commerce. Dismissing that complaint, President Judge Oliver said:

“A tax on the salary or wage which an employee receives for services *rendered in interstate commerce is not a tax on the commerce*

but on the return for his work realized by the individual. In the ordinary course, when an employee receives his salary or other compensation, he has performed his service, his part in the interstate transaction is at an end and the tax is upon what he has earned therefrom for his personal use and enjoyment. Such compensation to the employee is comparable in that respect to the net profits realized by the employer. Each represents what is available for the uses of the employee or employer respectively, after completion of the interstate commerce and in each case such return is taxable as property belonging to the recipient. Furthermore, the tax in the present case is not imposed on the corporation, firm, or individual engaged in carrying on interstate commerce for the purpose of making a profit therefrom, but only upon certain employees of such business ventures. For both of these reasons it is inconceivable that the tax now before us could have the effect of impeding or discouraging the conduct of interstate commerce. Necessarily, as in the case before us, it must be fair, and no greater than the tax on salaries and wages earned in intrastate business, or it would be invalid because discriminatory." (Italics supplied)

A case that might be of some interest in the consideration of this question is *SAXE v. BOARD OF REVISION OF TAXES*, 311 Pa. 545; 166 A. 853.

In that case the State Supreme Court held that despite the fact that a statute of the United States provides that no sum of money due to a pensioner shall be liable to attachment, etc. while in the course of transmission to the pensioner, a guardian who

received such money and invested the same in mortgages was not entitled to an exemption from the tax imposed by the Personal Property Tax Act of 1913. The opinion of Judge Baldrige, of the Superior Court, was adopted by the State Supreme Court. In the course of that opinion this language was used:

“ * * * exemption provisions must be strictly construed * * *. As a practical matter, it would be difficult, indeed, to earmark and trace money paid by the government, invested from time to time by the pensioner or his guardian in mortgages or real estate, and ascertain if all or part of such investments represent money exempt from taxation. Furthermore, it would result in changing the general rules of construction of state and federal statutes; *it would exempt a veteran from the payment of gasoline or a sales tax, etc., if purchase was made by money received from the federal government under the provisions of this act*”. (Italics supplied)

This principle of law received further recognition by the Supreme Court of this State in **MARSON v. CITY OF PHILADELPHIA**, Pa.
21 A. (2d) 228 (A. R. 8-23-41).

But appellant, in spite of the foregoing decisions settling the law on this question, still argues that the present ordinance which taxes general income, when applied to income received from the federal government is “a real burden upon the government itself”, and that it will interfere with defense work.

A similar contention was made by the writer of the appellant's brief in the instant case on behalf of the appellant in the Marson case, in that he argued

that this ordinance when applied to salaries of State employes will endanger or impair the efficiency of the State government. Mr. Justice Maxey, in answering that contention, said:

“We find in the ordinance challenged, no attempted setting aside of the State’s fundamental laws, and no danger to or impairment of, the efficiency of the State government”.

Applying this language to the instant case, appellee contends that if this ordinance, when applied to salaries of State employes, is not considered as in any way interfering with the State government, likewise does it follow that it will not in any way interfere with the efficiency of the federal government.

If the City and State are to be prevented from imposing a tax on the income of federal employes simply because many of the federal employes are engaged in defense work, then might it not with equal force be contended that the State and the City could not reach the income of both employers and employes engaged in private industry, merely because they also are engaged in supplying material and equipment required in national defense? And if that contention were upheld then both state and municipal governments would be crippled and unable to carry on the general functions of government for the lack of revenue. Merely to state the proposition is the best proof of its absurdity.

It is difficult to understand why federal employes residing in Philadelphia should be a privileged class, free from bearing their share of the cost of the institutions upon which their well-being, if not their

life, depends, as was so well put by Mr. Justice Holmes, in the case of *Evans v. Gore*, *supra*.

The most effective answer to such a theory is that the law does not consider federal employes as a privileged class, to be exempt from general taxation.

Appellant further argues that federal employees who work at the Philadelphia Navy Yard, and other federal buildings, title to which is in the United States, are working outside of Philadelphia, and, therefore, exempt from the provisions of this ordinance.

The City recognizes that League Island, on which the Philadelphia Navy Yard is located, was ceded to the United States Government by the Act of February 10, 1863, P. L. 24, and the Supplemental Act of February 4, 1866, P. L. 96 (74 PS 1 Note); and under such Acts, the federal government was given exclusive jurisdiction thereover, except for criminal or civil processes; and by reason thereof the area of the Philadelphia Navy Yard may be considered to be outside of the City of Philadelphia.

However, assuming that to be true, it does not follow that the salaries of such employes who reside in Philadelphia, are thereby exempt any more than the salaries of other employes residing in Philadelphia who work for private employers having their place of business outside of Philadelphia.

In the *MARSON CASE*, *supra*, a similar contention was advanced by the writer of the brief in the present case, namely, that the present ordinance could not apply to the salary of State employes residing in Philadelphia who perform their services

outside of the City of Philadelphia. Mr. Justice Maxey, in the opinion which he filed in the MARSON CASE, *supra*, states:

“The court below held that the language of the ‘Sterling Act’ was so ‘comprehensive and all embracing as to’ include the appellant and all others similarly situated, and that the tax applied to State employes residing in Philadelphia” * * *

“When the City of Philadelphia by its ordinance imposed a tax on the salaries, wages, commissions and other compensation earned after January 1, 1940, by ‘residents of Philadelphia’ it clearly meant *all* residents of that City’ ”. (Italics supplied)

When this language is applied to the present case it obviously means that federal employes residing in Philadelphia are also included within the language “it clearly meant *all* residents of that City”.

In CANNON v. BRESCH, 307 Pa. 31, 34; 160 A. 595, Mr. Justice Drew, in considering the word “*all*” used in a lease, said:

“The terms are emphatic—the word ‘all’ needs no definition; it includes everything, and excludes nothing. There is no more comprehensive word in the language, and as used here it is obviously broad enough to cover liability for negligence”.

It, therefore, follows that when Mr. Justice Maxey considered the language of this ordinance as including *all* residents of the City of Philadelphia, he did not mean to exclude federal employes residing in Philadelphia, but, on the contrary, to include them.

Appellant further argues that by reason of the fact that on October 9, 1940 an Act of Congress was adopted, 4 U.S.C.A. 14 (Adv. Sheets of February 1941), providing that no person shall be relieved from liability for any income tax levied by any State or by any duly constituted taxing authority therein having jurisdiction to levy such a tax, by reason of his residing within a federal area or receiving income from transactions occurring or services performed in such area, and it shall be applicable only with respect to income or receipts received after December 31, 1940; that, therefore, it must be implied that prior to December 31, 1940 no State, or any of its governmental agencies had a right to tax income received by federal employees who were working within a federal area.

It is difficult to follow that contention. The Public Salary Tax Act of April 12, 1939, amended June 25, 1940, (26 U.S.C.A. 22) was adopted after the decision in *GRAVES v. O'KEEFE*, *supra*, was rendered; and yet it might as well be argued that, since Congress for the first time adopted an Act which granted the right of state taxing authorities to tax salaries of federal employees, that, therefore, prior thereto the State could not impose such a tax. Such an argument is entirely destroyed by the fact that the Supreme Court of the United States, prior to the passage of the Public Salary Tax Act, decided that salaries of federal employees could be taxed by the State and its agencies.

That Act had two purposes, (a) to declare the existing law, (b) to prohibit the Secretary of the Treasury from attempting to collect the tax based on the salaries of public officials earned prior to December 31, 1938. The adoption of that Act is

a complete refutation of appellant's contention, because it amounts to a recognition by Congress that the taxation of salaries of public officials in every department of the federal government cannot possibly interfere with federal functions (since consent is clearly given to States and other taxing agencies to impose such taxation); as well as a recognition by Congress that the right to tax such salaries had always been the law, though most public agencies mistakenly thought otherwise. Congress in order to prevent the presentation of tax bills to such officials restricted the right of the Secretary of the Treasury to collect these taxes **OTHERWISE THE SECRETARY OF THE TREASURY COULD HAVE CLAIMED AND COLLECTED TAXES FROM PUBLIC OFFICIALS EARNED BY THEM DURING THE TIME WHEN THE SUPREME COURT OF THE UNITED STATES HAD HELD THAT SUCH SALARIES WERE NOT TAXABLE.** The adoption by Congress of the Act of October 9, 1940 likewise amounts to an acknowledgment by Congress that the taxation of federal employees *even though employed on federal reservations is not an interference with the defense program*, for it must be borne in mind that when that Act was adopted the President had already declared a state of emergency.

2. DOES THE STERLING ACT OF AUGUST 5, 1932, P. L. 45, (53 PS 4613) PERMIT THE CITY TO IMPOSE A TAX UPON THE INCOME OF NON-RESIDENTS EARNING SUCH INCOME IN THE CITY OF PHILADELPHIA; AND RESIDENTS OF PHILADELPHIA, REGARDLESS OF WHERE THEY EARN THEIR INCOME?

The Affidavit of Defense raising Questions of Law assigns as a second objection to the right of the City to maintain its claim that the City has no power under the Constitution and laws of the Commonwealth of Pennsylvania, including the Act of August 5, 1932, P. L. 45, to exact the aforementioned tax (R. p. 4a).

It is difficult to understand the purpose of the defendant in claiming that there is any prohibition in the State Constitution upon the City to impose a tax upon the income of residents and non-residents who earn their money here. Plaintiff does not know of any provision in the State Constitution relating to such a prohibition.

Besides, the constitutionality of this Ordinance has already been passed upon on three different occasions by the Court of Common Pleas No. 7 namely, DOLE vs. CITY OF PHILA., 337 Pa. 375, 11 A. (2d) 163; JOHN B. DOUGHTEN v. CITY OF PHILA., C. P. No. 7, March 1940, No. 1410, and STOUDT et al. v. CITY OF PHILA., 38 D. & C. 222. The decision of C. P. No. 7 in the Dole case was affirmed by the Supreme Court of Pennsylvania.

The constitutionality of this Ordinance was also passed upon by the Supreme Court in a case of a

State employe, namely, MARSON v. CITY OF PHILA., 21 A. (2d) 228.

The constitutional objections raised by the defendant seem, therefore, to be foreclosed against him.

The defendant also includes in his second objection the Act of August 5, 1932, P. L. 45, 53 PS 4613, known as the "Sterling Act".

Plaintiff respectfully urges that this very objection was also passed upon by the Supreme Court of Pennsylvania in the DOLE case and MARSON case, supra.

Section 1 of that Act provides:

"It is the intention of this section to confer upon cities of the first and second classes the power to levy, assess and collect taxes upon *any and all subjects of taxation* which the Commonwealth has power to tax but which it does not now tax or license." (Italics supplied).

The words "*any and all subjects of taxation*" indicate very clearly that it was the intention of the Legislature to grant to the City the same broad powers of taxation that the State of Pennsylvania has, except as regards subjects that the State already taxes. Indeed, the Supreme Court of Pennsylvania in BLAUNER'S, INC. v. CITY OF PHILA., 330 Pa. 340, 348, 198 A. 889 so decided when it said that "under such a broad legislative grant, the city's power of collection is limited only by constitutional restrictions", thereby intending to say that the City had the statutory authority to impose the tax here complained of.

It follows that if the City has the same broad powers that the State has in its taxing powers, being limited only by constitutional restrictions, and since no constitutional restrictions can be pointed out, that the City would have a right to include in an Ordinance taxing the general income, Federal employes residing in Philadelphia even though some or all of their income may be obtained from the United States Government.

In the MARSON case, *supra*, the writer of appellant's brief in the instant case, argued that the Legislature in adopting the Sterling Act could never have intended to empower the City of Philadelphia to levy taxes against State employes, and since the Sterling Act failed to specify State employes as being subject to the tax they are, therefore, excluded. This is obvious from the language of Mr. Justice Maxey in the MARSON case, which is as follows:

“Appellant contends that because the ‘Sterling Act’ failed to specify employes of the State as being subject to the tax they are therefore excluded”.

Mr. Justice Maxey answered this contention as follows:

“The court below held that the language of the ‘Sterling Act’ was so ‘comprehensive and all embracing as to’ include the appellant and all others similarly situated, and that the tax applied to State employes residing in Philadelphia”.

Again, attention is called to the words used in the Sterling Act, namely, “any and all subjects of taxation”.

The words "any and all" are in the language of Mr. Justice Drew in *CANNON v. BRESCH*, supra, all inclusive, sufficient to bring within their meaning federal employees.

Appellant, apparently realizing that the decision in the *MARSON* case would foreclose any contention that since in 1932, when the Sterling Act was adopted, the City had no power to tax Federal employees, and, therefore, the Legislature did not intend to grant such power to the City; attempts to escape the consequences of that decision by arguing that the *MARSON* case may be distinguished from the present case because in 1932 it was lawful, constitutional and customary in Pennsylvania for municipalities to tax State occupations and salaries, whereas Federal employees were considered as immune until 1938 under the implied doctrine of immunity (appellant's brief, p. 17). But the writer of the brief in the present case argued just the contrary in the *MARSON* case. There he argued that the City had no power to tax State employees.

The appellant cites *Dobbins v. Erie County*, 16 Peters (41 U.S.) 435, 10 L. Ed. 1022, wherein the Supreme Court of Pennsylvania was reversed (7 Watts 513) in upholding a tax adopted by the County of Erie on posts of profit offices, occupations, etc., when a levy was made upon the office of a captain of the United States Revenue Service at Erie Station. It is true that the Supreme Court of the United States held that this tax was unlawful when applied to the office of a captain of a United States Revenue cutter, but it does not follow that a general income tax would have been declared illegal, even though it would have reached the salary of a federal officer.

As a matter of fact, in the case of *COMM. v. MANN*, 5 W. & S. 403, 417, with the decision of the United States Supreme Court in the *DOBBINS* case before it, because it referred to the case in its decision, although striking down a tax against the salaries of an office created or held by or under the *constitution* of this commonwealth, said:

“The property of a judge, his income, whether derived from this or any other source, we admit is a proper subject of taxation”.

It will thus be seen that the Supreme Court of Pennsylvania, almost a century before the United States Supreme Court finally settled the law on the subject, carefully distinguished between a tax *levied directly upon the salary of a Judge*, and upon income *measured by the judge's salary*.

Appellant points out that the traditional rule of the *DOBBINS* case was as recently recognized by this Court as March 13, 1935, in *Short v. Upper Moreland Township School District*, 117 Pa. Super. Ct. 227, 177 A. 480. An allocatur from the decision of Judge Cunningham was refused by the State Supreme Court, 117 Pa. Super. XXVII; and the United States Supreme Court dismissed an appeal in 296 U. S. 663, 80 L. Ed. 383; and denied a rehearing, 296 U. S. 663; 80 L. Ed. 473. In that case the School District of Upper Moreland Township in the year 1930 levied a tax of five dollars on each resident thereof over twenty-one years of age, which continued in 1931, while in the year 1932 the tax was fixed at three dollars. This was done under the provisions of Section 542 of the Act of May 18, 1911, P. L. 309, amended on May 11, 1921, P. L. 508, Sect. 4.

The plaintiff, challenged the validity of the tax as against him because he was a mail clerk in the employ of the United States government, claiming that he was exempt on the ground that State Governments cannot levy a tax upon the constitutional means employed by the government of the union to execute its sovereign power. He further argued that as a mail clerk he is such a means; that the tax is laid directly on him; and so upon the means; and that consequently it falls within the exemption claimed.

It may be of interest to observe that, although the appellant in the case at bar, argues that in 1932 the law in Pennsylvania was settled that the salary of federal employes could not be included in a general State tax, yet Judge Cunningham in the cited case said:

“The rule itself, as a general proposition, cannot be challenged; but the question here involved is whether it is applicable to the facts at bar. Appellant has neither cited, nor have we found, a case in which the precise point has been decided”.

From this language it would appear that the appellant is in error when he argues in the case at bar that in 1932, when the Sterling Act was passed, it was the settled law in the State of Pennsylvania that the salaries of federal employes could not be subjected to a State or municipal tax levied without discrimination on all residents of the district.

Judge Cunningham reviews many of the decisions of the Federal Court relating to this subject matter, and comes to the following conclusion:

“If such is the rule, even where the tax is measured in part by the amount of exempt income received, it is unnecessary to labor the point that there is no real interference with a federal instrumentality by the small flat tax here involved”.

It is respectfully submitted that Judge Cunningham's opinion is a complete answer to the appellant's contention in the case at bar; and that up to 1932 it had not been decided in this State that the wages of a federal employe is exempt from a general income tax.

The DOBBINS case is distinguishable because it was a tax on a Federal office. The case of COMM. vs. MANN, *supra*, clearly illustrates that in this State the law up to 1932 was that a non-discriminatory tax laid generally on net income was not, when applied to the salary of a particular individual, a diminution of his salary even as against a constitutional mandate forbidding diminution of such salary. And if there is no diminution, then there is no burden on the source from which the salary flows.

The MANN case was cited by Solicitor General Robert H. Jackson, in the case of O'MALLEY vs. WOODROW, *supra*, where Mr. Justice Frankfurter pointed out that the decision of EVANS vs. GORE, *supra*, was rejected by most of the Courts before whom the matter came after that decision.

Appellant further cites many cases in support of the rule that in considering the meaning and intention of the Legislature in adopting an Act of Assembly, the court should consider the interpretation placed by the courts upon an earlier Act containing similar language. That rule is not question-

ed, but it has no application to the question involved. No earlier interpretation of the provisions similar to those of the Sterling Act was involved in any decision in this Court, or any other court of Pennsylvania, as there was no earlier Act containing similar provisions.

The appellant contends that by the Sterling Act the City is limited to the imposition of taxes upon such subjects as the State *then* had power to tax, and arguing, though erroneously, that the State had no power to tax federal employees in 1932, he draws the conclusion that the City now has no such power, though the State may have. A somewhat similar argument was made in *BANGER'S APPEAL*, 109 Pa. 79, 90, 91 (1885), in which case a statute was under consideration which gave municipalities of the third class the right to impose taxes on occupations, etc. which were taxable for either State or County purposes. The following quotation from that opinion shows the Supreme Court's reaction to that argument, and is a complete answer to the argument made here:

"It was contended, however, that as there is no state tax on 'occupations', it is not enough to show that they are made by law taxable for county purposes. In other words, before the city can show that she can tax any species of property it must appear that such property is taxable both for state and county purposes. We regard this as a narrow view of the Act of 1875. It was evidently intended to authorize cities of the third class to levy a tax upon any species of property which is at the same time taxable for either state or county purposes. The state limits its taxation to few

subjects. Real Estate is entirely exempt. If we sustain the contention of the appellants the city could not tax the real estate within its limits, and upon the same principle many other prolific sources of revenue would escape taxation altogether by the municipality. It could not raise revenue to light its streets or pay its policemen”.

BANGER’S APPEAL, *supra*, at pp. 90, 91.

The Legislature in adopting the Sterling Act intended to, and did delegate to the City of Philadelphia its inherent taxing power which included not only such power as it then possessed, but all that it could subsequently exercise. Consequently, when in 1939 it was settled by the United States Supreme Court that salaries of federal employes are not exempt from general income taxes, it followed that the State of Pennsylvania always had authority to reach salaries of federal employes by a general income tax, *which power was delegated to the City of Philadelphia under the Sterling Act.*

If the appellant’s argument on this point were valid, then the decision of the Supreme Court of the United States in *GRAVES v. O’KEEFE*, *supra*, would be incorrect, for when Congress adopted the various income tax laws salaries of State employes were immune from federal taxation. Consequently, following the appellant’s argument, the Supreme Court of the United States in 1939 was bound to adopt the interpretation put by the Court on the income tax law in existence at that time in conjunction with the theory of government immunity. Yet, without an Act of Congress amending the federal income tax so as to fall in line with the new theory of no government immunity, the Su-

preme Court of the United States declared that the salaries of federal employes were not exempt from a State income tax, and, likewise, would not the salaries of State employes be exempt from federal income tax.

This again refutes the contention advanced by the appellant.

It is, therefore, respectfully submitted that the law as announced in 1939 by the United States Supreme Court must necessarily be read into the Sterling Act, and that under it the State Legislature delegated to the City of Philadelphia the same broad powers which it had, which included the right to adopt a general income tax under which the salaries of federal employes would be included.

CONCLUSION.

Appellant is fearful that if this ordinance is applied to the \$21.00 per month received by those serving in the training camps and in the military, naval and air services, it would affect their morale and would seriously interfere with the defense program.

It comes with bad grace for the defendant to rush to the rescue of those earning \$21.00 per month in order to enable himself to escape the payment of \$38.95 to the City that affords him the opportunity to live here and protects him and his family from all hazards and dangers, when he is earning a salary of \$217.00 a month.

Since he is not a member of the class that he seeks to protect, he is in no position to complain of any application of the ordinance to that class.

It may be of interest to note that no complaint is made by the Government itself to this tax and when appellant attempted to induce the Attorney General of the United States to protest against this tax by joining him in his attempt to evade the payment of the tax, he was unsuccessful. What stronger proof is required to demonstrate that the official representative of the Government did not believe that the payment of \$38.95 by the defendant will endanger the defense of this country, or drive the orderly system of government to anarchy.

It is to be deplored that the defendant in this case has to resort to trading on the patriotism of those gallant young men who have joined the armed forces of this country at a great sacrifice to themselves in order to help this country to prepare against the foes of democracy, so that he may be spared the duty of contributing in a small measure to sustain the very municipal government that permits him to enjoy the results of the compensation that he receives from the government.

If defendant's contention were to be taken seriously, then following the reasoning of the Court in *SAXE vs. BOARD OF REVISION OF TAXES*, supra, the thousands of federal employees residing in this city, who, out of the generous compensation received from the government are able to buy their own homes, would then be in a position to contend that they are exempt from the payment of city real estate taxes; or if they own personal property

subject to the personal property tax, they could contend that they were exempt from the payment of such taxes simply because their compensation is received from federal funds, that to be compelled to pay such taxes would result in seriously endangering national defense and result in anarchy. In fact, to drive such arguments to a point of absurdity, it might even be contended by such federal employees that they ought not to pay for food, clothing, lodging or any other of the necessities of life because their compensation comes from federal funds and to so utilize those funds would be interfering with national defense work. Sustaining these contentions would result in creating a privileged class consisting of federal workers who receive substantial amounts of salary from the federal government out of funds contributed by the law abiding, faithful and patriotic citizens other than those receiving compensation from federal funds, who would be permitted to retain those funds and live off the monies contributed by others. If there is any fear of anarchy arising in this country, such a situation would be more conducive to creating a condition of anarchy.

Congress in enacting and the President, in signing ~~on~~ ^{the Act of} October 9, 1940, removed any right on the part of federal employees in performing services in a federal area to claim any exemption from state or municipal taxation by reason thereof, thus showing they did not believe that the national defense work of this country would be in any way interfered with when federal employees would contribute to the support of the state and municipal governments affording them the right to live therein and receive protection from them.

The defendant might as well argue that when he is compelled to pay the many burdensome federal taxes out of the salary that he receives from the federal government, that the federal government itself is crippling and seriously endangering national defense.

It is respectfully urged upon this Court that the same reasons which persuaded the Supreme Court to dismiss the appeal filed by the State employes in the MARSON case are applicable to the contentions made by the appellant here, and that a tax which applied to State employes has been held not to interfere with State functions must of necessity be held to constitute no ^{infer}ference with federal functions when applied to federal employes.

It is respectfully submitted, therefore, that the appeal should be dismissed.

Respectfully submitted,

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I hereby certify that cases cited from other than official reports do not appear therein.

ABRAHAM WERNICK.